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TIONG CHIONG ING

v.

HII SIEW NGIIK & ORS

b

HIGH COURT SABAH AND SARAWAK, SIBU
TEE AH SING J
[SUIT NO: 20-22-30 OF 1997]
16 APRIL 1999

c

CIVIL PROCEDURE: *Amendment - Statement of claim - Quantum of damages - Summary judgment entered with consent of defendants - Whether statement of claim may be amended before damages assessed - Whether defendants cannot dispute liability for increased sum having earlier admitted liability - Whether defendants prejudiced - Whether application to amend made bona fide*

d

CIVIL PROCEDURE: *Pleadings - Amendment - Proper practice - When and whether an affidavit explaining the need to amend ought to be filed*

e

The plaintiff had been granted summary judgment with the consent of the defendants and proceedings for assessment of damages were underway. In the midst of those proceedings, the plaintiff made this application to amend his statement of claim. The amendments sought were in respect of the quantum of damages claimed. The original statement of claim listed 4355 cubic metres of soil as having been lost whereas the amendments sought included changing this to 8249 cubic metres. This, amongst other things, resulted in the special damages claimed being increased from RM91,467 to RM97,960. The defendants opposed this application on the grounds that they would be prejudiced if the amendments were allowed and that this application was not made *bona fide*. They submitted that since summary judgment had been entered by consent, they are precluded from disputing the plaintiff's claims and further, they would not have consented to summary judgment being entered against them based on the proposed amendments. The plaintiff, in reply, argued that the defendants would be able to challenge any evidence at the proceedings for assessment of damages. The plaintiff further submitted that the summary judgment was only in respect of liability and not in respect of quantum of damages and thus, the question of *bona fide* did not arise.

*f**g**h***Held:***i*

[1] The normal practice employed when amending pleadings is to underline the amendment in red and to cross out those unwanted pleadings using red colour also. The purpose of using red colour markings is to enable the court and the parties to know from one glance the nature of the amendment. It is not permissible to change the text of the pleadings without using those colour markings.

- [2] The law as to amendment does not normally require an affidavit in support to be filed but there are situations that warrant an affidavit to be required to explain the need for the amendment. The amendment sought in this case with regards the difference in the amount of soil lost is a situation where an explanation is not only prudent but necessary. a
- [3] The amendment as to the amount of soil lost would prejudice the defendants as they would be liable for damages in excess of 4355 cubic metres of soil. By the consent order, the defendants consented to being liable up to a maximum claim of 4355 cubic metres of soil. Thus, if the amendment was to be allowed, the defendants would be prejudiced and they cannot be compensated by costs. Further, by the consent judgment in respect of liability, the defendants are precluded from having the right to amend their statement of defence if the amendments were allowed. b
- [4] The defendants had admitted liability and that their liability for special damages would be limited to the maximum sum of RM91,467. By admitting liability, the defendants had lost their rights to dispute liability for the increased sum. c
- [5] The court accepts that had the claim as in the proposed amendment been pleaded, the defendants would not have agreed for consent judgment to be entered. Further, as consent judgment had been entered against the defendants, the application is not made *bona fide* as the defendants are estopped from denying the plaintiff's case. d

[Application dismissed.]

Case(s) referred to:

Bacom Enterprises Sdn Bhd v. Jong Chuk [1998] 2 CLJ 11 (*refd*) e

Legislation referred to:

Rules of the High Court 1980, O. 20 r. 5, O. 27 r. 3

Other source(s) referred to:

Atkin's Court Forms, 1974, 2nd edn, vol 32, p 101, form 42 f

White Book, 1985, vol 1, p 339 g

For the plaintiff - Joseph Tang; M/s Tang & Co

For the second and third defendants - Wong Ho Leng; M/s Wong Ho Leng Co h

Reported by S Dharmendran

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JUDGMENT

Tee Ah Sing J:*b*

This is an application by the plaintiff under O. 20 r. 5 of the Rules of the High Court 1980 (“the RHC”) for an order that the plaintiff be at liberty to amend the statement of claim dated 18 July 1997 by altering the same in the manner shown red.

The grounds of the application are:

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(1) That the amendment will enable the plaintiff to bring in real issues or matters which are necessary in his proof of damages.

(2) That the amendment is made *bona fide* and would cause no injustice to the defendants.

d

The learned counsel for the plaintiff submitted that in this case liability has not been contested. Assessment of damages is now underway before the Senior Assistant Registrar (“the SAR”) and it is in the middle of the assessment that the application for amendment is made.

e

The proposed amendments are in respect of the quantum of damages. By the amendment to para. 6 of the statement of claim the plaintiff is adducing evidence as to the aggravated form of trespass and prays for exemplary damages. The amendment to para. 7 is in respect of the special damages. On the prayer part the amendment is to the total amount of special damages. In support the case of *Bacom Enterprises Sdn Bhd v. Jong Chuk* [1998] 2 CLJ 11; [1998] 2 MLJ 301 was cited.

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The learned counsel for the 2nd and 3rd defendants submitted that on 31 October 1997 this court allowed the application for summary judgment and allowed judgment to be entered with damages to be assessed before the SAR. It is important to bear in mind that the summons in chambers under O. 27 r. 3 of the RHC dated 8 October 1997 was on the original pleadings and the consent judgment was entered. The consent judgment was entered because he as counsel for the 2nd and 3rd defendants agreed with the original pleadings. The 2nd and 3rd defendants would be severely prejudiced if the application is allowed. He submitted that he would not have judgment entered by consent based on the proposed amendments. The prejudice cannot be compensated by costs because the 2nd and 3rd defendants will now have no chance whatsoever to contest the summary judgment application. Secondly, this application is not *bona fide* because it comes too late after summary judgment had been entered by consent of the parties which would deny the 2nd and 3rd defendants to dispute the plaintiff’s case in the event of a trial.

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The original para. 4 of the statement of claim reads “to a depth of approximately 4355 cubic metres (volume) by mean of bulldozer”. However this has been deleted from the proposed amendment. In the proposed amendment are added “and other means” which are not in the original. *a*

The normal practice is to underline the amendment in red and deleting by crossing out those unwanted pleadings in red colour also. The purpose of those red colour markings is to enable the court and the parties to know by one glance the nature of the amendment. It is not permissible to change the text of the pleadings without using those colour markings. *b*

Paragraph 4 of the intended amendment suffers the defects of not notifying the court and the parties. *c*

The original para. 6 differs from the proposed amendment in para. 6 in absolute terms in that it is completely different.

Paragraph 7 by comparison can also be shown to be failing to comply with normal practice. *d*

Fourthly, there is no explanation by the plaintiff as to why the original pleadings had to be departed from.

The law as to amendment is an affidavit in support is normally not required but there are situations which warrant an affidavit to be required to explain why there is to be departure. *e*

The original para. 4 mentions 4355 cubic meters. Those 4355 cubic meters has disappeared from the proposed para. 4. However, by para. 6 of the proposed amendment the total volume claimed is 8249 cubic meters. And under the particulars 8249 cubic meters is also mentioned. It is a situation where an explanation is not only prudent but necessary. *f*

The last ground is that the plaintiff cannot seek to amend para. 6 in order to claim for exemplary damages. By virtue of the order made on 31 October 1997 damages to be assessed are those damages which are quantifiable. *g*

The learned counsel for the plaintiff in reply submitted that the assessment of damages would not in any way affect the consent judgment entered. In the assessment of damages the normal proof required in the civil proceedings has to be discharged by the plaintiff and the defendant is entitled to challenge the evidence as the trial proceeds. It is incorrect to say that there will be no trial whereby the defendants could challenge. What cannot be challenged is the fact of trespass and the taking away of the earth from the plaintiff’s land. The manner in which the trespass was committed and amount of earth taken from the plaintiff’s land is for the court to assess. And evidence must be allowed *h*
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- a* to be adduced to prove trespass and the volume of earth taken. And in so doing the court must have the power to amend the pleadings so as to allow the contentious issues and real issues in dispute to be brought.
- By bringing these issues before the court the defendants could not be said to be prejudiced because this is part and parcel of our trial system.
- b* The question of damages has gone for trial and in this case the general principles of amendment must apply to the trial whereby damages is being determined. The summary judgment was only in respect of the liability and not in respect of quantum of damages so the question of *bona fide* does not arise.
- c* The manner in which the amendment is made is in accordance with the format as laid down in *Atkin's Court Forms*, 2nd edn, vol. 32 (1974) issue at p. 101 Form 42. There must be authority to support the contention what is the normal practice.
- d* In so far as the amendment is concerned, it has to be in clear terms. In support the 1985 *White Book*, vol. 1 p. 339 was cited.
- e* If we look at para. 7 of the proposed amendment it is obvious that the figure 4355 cubic meters of earth has been amended to 8249. And this is a matter for the plaintiff to adduce evidence at the trial where the defendants would be given opportunity to cross-examine the witnesses for the plaintiff. The defendants will also be given opportunity to present his case as to how much soil has been taken away.
- f* By changing that type of figure and application to amend requires no explanation or affidavit. Evidence at the trial will explain everything.
- The defendants would be given opportunity to explore the point by cross-examination or by adducing evidence.
- g* I shall now deal with the application.
- The plaintiff by a summons in chambers under O. 27 r. 3 of the RHC dated 8 October 1997 prayed for the following orders:
- h* (1) that judgment be entered for the plaintiff against the 2nd and 3rd defendants for damages caused to the plaintiff's land and the amount of special and general damages as claimed in the statement of claim be assessed by the Senior Assistant Registrar and
- (2) that the costs of this application and costs incurred incidental thereto be borne by the 2nd and 3rd defendants.
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When this application came up for hearing on 31 October 1997, the 2nd defendant and the 3rd defendant were represented by counsel and a consent order was entered in terms of the application.

In the proposed amendment for para. 4 of the statement of claim, the plaintiff has deleted the words “to a depth of approximately 4355 cubic metres (volume)”. This in my view would prejudice the defendants as they would be liable for damages in excess of 4355 cubic metres of soil which cannot be compensated by costs if the proposed amendments were allowed. Further by the consent judgment in respect of liability, the defendants are precluded from having the right to amend their statement of defence if the proposed amendments are allowed. I also agree with the defendants’ contention that they have no chance whatsoever to contest the summary application under O. 27 r. 3 of the RHC.

I agree with the contention of the defendants that para. 6 of the proposed amendment is a complete departure from the original para. 6 in that the proposed amendments now include “the total volume of excavated and carried away soil from the plaintiff’s land amounted to 8249 cu. meters.” However, in para. 4 of the original statement of claim the amount of soil alleged to be taken away was 4355 cubic metres.

By the consent order the defendants consented that the amount of special and general damages as claimed in the statement of claim be assessed by the SAR. So the defendant consented that they would be liable up to the maximum claim of 4355 cubic metres of soil subject to proof but not the claim for 8249 cubic metres of soil. As such, I am of the view to allow the proposed amendments would prejudice the defendants which cannot be compensated by costs.

In the original para. 7 of the statement of claim under plaintiff’s particulars of damages it was pleaded as follows:

Plaintiff’s Particulars of Damages

- | | |
|--|-------------|
| (1) Loss of 4355 cubic metres of soil
worth at RM5.00 per cubic metre | RM21,775.00 |
| (2) Cost of earth filling the
defendant’s land to a level of
3.50 feet for building houses | RM58,362.00 |
| (3) Loss of fruit trees:
10 coconut trees & 5 durian trees | RM 850.00 |
| (4) Damage to mobil phone as a result of
going to the site | RM 480.00 |

<i>a</i>	(5) Loss of wages for 40 days @ RM200.00 and fuel and other expenses for going to the site	RM 8,000.00
	(6) Site Survey & Valuer Report Fee	<u>RM 2,000.00</u>
<i>b</i>	Total:	RM91,467.00 =====

And in the proposed amendments to para. 7 the plaintiff's particulars of damages are to be amended as follows:

c **Plaintiff's Particulars of Damages**

<i>d</i>	(1) Total loss of soil @ RM32.00 per lorry/truck (7 cu. yard per truck load of loose earth equals to 3.4 cu.m. of compacted soil). Total numbers of trucks load of the soil taken away: $8249 \div 3.4 = 2426$ trucks. Costs per truck load at PM32.00 Total amount is $RM32.00 \times 2426 = RM 77,632.00$	RM 77,632.00
	(2) Loss of fruit trees, 10 coconut trees and 5 durian trees	RM 850.00
<i>e</i>	(3) Loss of wages for 40 days @ RM200.00 per day, days and fuels etc.	RM 8,000.00
<i>f</i>	(4) Site Survey	RM 3,000.00
	(5) Land Surveyor fees inclusive contour map	RM 2,550.00
	(6) Turfing	<u>RM 5,928.00</u>
	Total	RM97,960.00 =====

- g* In para. 7(1) the original claim of loss of 4355 cubic metres of soil has been substituted by a claim for loss of 8249 cubic metres of soil. In para. 7(4) of the proposed amendment the sum claimed for site survey is RM3,000 whereas the original claim was RM2,000. Paragraph 7(5) of the proposed amendment for land surveyor fees inclusive contour map for RM2,550 was not claimed in the original pleading. Similarly, para. 7(6) of the proposed amendment for turfing amounting to RM5,928 was not claimed in the original pleading.
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- i* I am of the view that the proposed amendments to include 8249 cubic metres of soil, the increase of RM1,000 for site survey, the additional claim of RM2,550 for land surveyor fees inclusive contour map and the additional claim for turfing of RM5,928 would prejudice the defendants in that they have to pay additional damages which cannot be compensated by costs.

In respect of para. 8 of the proposed amendment under prayer (3) the claim for special damages from RM91,467 to RM97,960 would prejudice the defendants which cannot be compensated by costs. It has to be borne in mind that the defendants had admitted liability and that their liability for special damages would be limited to the maximum sum of RM91,467 subject to evidence being adduced to substantiate this maximum sum of RM91,467. Further, the defendants have lost their rights to dispute liability for the increased sum as they have admitted liability.

I accept the defendants' counsel contention that had the claim been pleaded as in the proposed amendment he would not have agreed for consent judgment to be entered.

Further, I am of the view that as consent judgment has been entered against the defendants pursuant to O. 27 r. 3 of the RHC, the application is not made *bona fide* as the defendants are estopped from denying the plaintiff's case.

In view of the foregoing, I dismiss the application with costs to be taxed unless agreed.

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